United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

77-4088

United States Court of Appeals

FOR THE SECOND CIRCUIT

GENERAL DYNAMICS CORPORATION, ELECTRIC BOAT DIVISION,

Petitioner,

—against—

BENEFITS REVIEW BOARD OF UNITED STATES DEPARTMENT OF LABOR; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; INSURANCE COMPANY OF NORTH AMERICA AND HELEN J. SOBOLEWSKI, WIDOW OF Joseph Sobolewski, DECEASED; and THE ESTATE OF JOSEPH S. SOBOLEWSKI, DECEASED,

Respondents.

APPEAL FROM THE BENEFITS REVIEW BOARD

BRIEF FOR INSURANCE COMPANY OF NORTH AMERICA, RESPONDENT

FRANK W. DALEY, Esq.
Attorney for Respondent
Insurance Company of North America
205 Church Street
New Haven, Connecticut 06510

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Facts 2

Issue Presented for Review 3

The Administrative Proceedings 3

ARGUMENT 4

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Arkansas: *Employers Lia. Assur. Corp.* v. *Employers Mut. Lia. Ins. Co.*, 232 Ark. 113, 334 S.W. 2d 701 (1960) 11

Associated Indemnity Corp. v. *Industrial Accident Commission*, 124 Cal. App. 378 7

Cardillo v. *Liberty Mutual Co.*, 330 U.S. 469 5

Delaware: *Alloy Surfaces Co.* v. *Cicamore*, 221 A. 2d 480 (Del. 1966) 11

Edwards v. *Catspano & Grow Constr. Co.*, 15 A.D. 2d 843, 224 N.Y.S. 2d 565 (1962) 11

Ennis v. *O'Hearne*, C.A. Md. 1955, 223 F. 2d 755 5

Federal: *Travelers Ins. Co.* v. *Cardillo*, 225 F. 2d 137 (2d Cir. 1955) 10

Grego v. *Travelers Ins. Co.*, 283 App. Div. 762, 128 N.Y.S. 2d 219 (1954) 11

PAGE

Harris v. *Silver Creek Precision Corp.*, 13 A.D. 2d 859, 214 N.Y.S. 2d 911 (1961) 11
Hudnell v. *O'Hearne*, D.C. Md. 1951, 99 F. Supp. 954 5

Kentucky: *Gregory* v. *Peabody Coal Co.*, 335 S.W. 2d 156 (Ky. 1962) 11

McCarthy Stevedoring Corp. v. *Norton*, D.C. Pa. 1940, 40 F. Supp. 960 6
Michigan: *Sosnowski* v. *Dandy Hamburger*, 384 Mich. 221, 180 N.W. 2d 761 (1970) 11
Minnesota: *Bituminous Gas Corp.* v. *Hartford Acc. & Indemnity Co.*, 283 Minn. 307, 167 N.W. 2d 741 (1969) 11

New York: *Mariani* v. *Solona Rubenstein, Inc.*, 19 A.D. 2d 916, 243 N.Y.S. 2d 964 (1963) 11
North Carolina: *Willingham* v. *Bryan Rock & Sand Co.*, 240 N.C. 281, 82 S.E. 2d 68 (1954) 11

Oklahoma: *Friendly Chevrolet Co.* v. *Pointer*, 435 P. 2d 579 (Okla. 1967) 11
Osborne Mining Co. v. *Davidson*, 339 S.W. 2d 626 (Ky. 1960) 11

Potenza v. *United Terminal, Inc.*, 524 F. 2d 1136 4

Ryan v. *Stevedoring Co.* v. *Norton*, D.C. Pa. 1943, 50 F. Supp. 221 6

South Carolina: *Glenn* v. *Columbia Silica Sand Co.*, 236 S.C. 13, 112 S.E. 2d 711 (1960) 12
Southern S.S. Co. v. *Norton*, D.C. Pa. 1941, F. Supp. 108 6

PAGE

Taratino v. *Em Cos Fashions,* 9 A.D. 2d 810, 192 N.Y.S. 2d 881 (1959) 11

Tennessee Tufting Co. v. *Potter,* 206 Tenn. 620, 337 S.W. 2d 601 (1960) 12

Tennessee: *Wilson* v. *Van Buren County,* 198 Tenn. 179, 278 S.W. 2d 685 (1955) 12

Underwriters at Lloyds v. *Alaska Indus. Bd.,* 160 F. Supp. 248 (D. Alaska 1958). Last insurer was solely liable. *Travelers Ins. Co.* v. *Cardillo,* immediately *supra* quoted 10

Urie v. *Thompson,* 337 U.S. 163 (1947) 6, 7

Watson v. *Gulf Stevedore Corp.,* C.A. Tex. 1968, 400 F. 2d 649 6

Statutes:

Larson's Workmen's Compensation, Volume 4, Section 95.21 10

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901 et seq. 2, 8, 12

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Respondents.

APPEAL FROM THE BENEFITS REVIEW BOARD

BRIEF FOR INSURANCE COMPANY OF NORTH AMERICA, RESPONDENT

Preliminary Statement

This is an appeal by General Dynamics Corporation, Electric Boat Division, as a self-insured employer, pursuant to 33 USC Section 921, from a decision of the Benefits Review Board, which affirmed the order and decision of the Administrative Law Judge (3a), Louis Scalzo, dated June 10th, 1976 (10a). The Benefits Review Board found that the Administrative Law Judge found that the claimant's lung condition which led to his death was causally

related to his employment, and that he awarded compensation for a permanent total disability to the claimant's estate from June 29th, 1973 to October 10th, 1973, except for five days he worked following his July hospitalization, and that claimant's widow was also awarded benefits under Section 9, 33 U.S.C. Section 909 (4a, 5a), and also found that the Administrative Law Judge correctly held General Dynamics, as self-insurer and not its carrier, the Insurance Company of North America (hereinafter referred to as INA), responsible for payments of the benefits under the rule in *Travelers Insurance Co.* v. *Cardillo,* 225 F. 2d 137 (2d Cir. 1955), *cert. denied,* 350 U. S. 913 (1955) (6a).

Statement of Facts

The deceased, Joseph Sobolewski, worked at the Electric Boat Division of General Dynamics in Groton, Connecticut as a pipecoverer or pipelagger and ultimately as a working leader, from November 28th, 1955 to June 29th, 1973 (13a, 15a and 16a) and returned to work activity on July 26, 27, 30, 31, 1973 and August 1 and 7, 1973 (13a). During this time, he was extensively exposed to asbestos fibers and dust, even in the area where the decedent had lunch (16a).

Prior to April 1st, 1973, INA was the compensation insurer for the Electric Boat Division of General Dynamics pursuant to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter the LHWCA) 33 U.S.C. Section 932 (a) (1). After April 1st, 1973, General Dynamics became a self-insurer pursuant to 33 U.S.C. Section 932 (a) (2) for purposes of workmen's compensation under the LHWCA.

The Administrative Law Judge further found that the decedent expired on October 19th, 1973 and that the immediate cause of death of the decedent was carcinoma of the lung (13a).

Issue Presented for Review

The issue in this case insofar as INA is concerned is that it was not on the risk from April 1st, 1973 to June 29th, 1973 and when the deceased returned to work activity on July 26, 27, 30, 31, 1973 and August 1, 7, 1973, during which latter period of time after April 1st when General Dynamics became a self-insured employer. The decedent was extensively exposed to asbestos fibers and dust or to injurious stimuli in his work environment after April 1st, 1973, and that under the "last employer rule," General Dynamics would be responsible for any benefits payable under the act.

The Administrative Proceedings

An Employee's Claim for Compensation, Form BEC 203, was filed with the office of Workers' Compensation Programs on October 4, 1974 (251, 252a). General Dynamics filed an Employer's First Report of Accident or Occupation Illness, Form BEC 202 on October 14, 1975 (253, 254a). A hearing was held before the Hon. Louis Scalzo, Administrative Law Judge, United States Department of Labor at New London, Connecticut on January 9, 1976.

This hearing resulted in an order and decision by the Administrative Law Judge dated June 10, 1976 (10a). General Dynamics filed timely notice of appeal (268a) and petition for review of the order with the Benefits Review Board (270a). The Benefits Review Board issued its order and decision dated February 16, 1977 (3a). General Dynamics timely filed its notice of appeal to this court pursuant to 33 U.S.C. Section 921 (1a).

ARGUMENT

The decedent, from November 28th, 1955 until approximately the date of initial discontinuance of work activity on June 29th, 1973, was engaged in work involving exposure to asbestos materials. This included classifications as a pipecoverer or pipelagger, pipecoverer specialist, and working leader (16a). The last employer after April 1st, 1973 to June 29th, 1973 and other days of work activity on July 26, 27, 30, 31, 1973 and August 1st and August 7th, 1973 was General Dynamics (13a). Asbestosis was not discovered until after the death of the decedent and at the time of the formal hearing on October 14th, 1975 was still denied by General Dynamics (15a).

The Administrative Law Judge found that permanent total disability as a result of lung cancer precipitated by asbestosis commenced on June 29th, 1973 and continued through October 10th, 1973, the date of death, excepting those days during which the decedent worked in July and August, 1973 and were not claimed as periods of permanent total disability (26a).

The Benefits Review Board affirmed the Administrative Law Judge's order and decision holding General Dynamics responsible for all compensation benefits (3a, 4a, 5a, 6a, 7a and 8a).

The Act Section 21 (b) (3), provides that findings of fact of an administrative law judge are conclusive if supported by substantial evidence in the record as a whole, applies to review in Court of Appeals (*Potenza* v. *United Terminal, Inc.*, 524 F. 2d 1136).

A reviewing court should not set aside an inference drawn by the Commissioner because the opposite one is thought to be more reasonable; nor can the opposite in-

ference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469, 485 at page 477, 478.

> "* * * It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm* v. *Commissioner*, 326 U. S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." * * * *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287.

The Administrative Law Judge's findings that General Dynamics is liable for the award was correct under the case of *Travelers Insurance Company* v. *Cardillo*, 275 F. 2d 137, 145 (2d Cir. 1955), *cert. denied*, 350 U. S. 913 (1955) (13a).

General Dynamics relies principally upon the testimony of its medical expert, Dr. Sagall, and of the testimony of Dr. Lilis considered retrospectively.

In this respect, the Deputy Commissioner is permitted to disregard medical testimony in proceeding under LHWCA and to rely on his own observation and other evidence before him in making his decision.

Ennis v. *O'Hearne*, C.A. Md. 1955, 223 F. 2d 755.

The Deputy Commissioner is not obliged to accept expert opinions as correct.

Hudnell v. *O'Hearne*, D.C. Md. 1951, 99 F. Supp. 954.

The Deputy Commissioner is not bound by uncontradicted testimony of medical witnesses where other evidence warrants a different conclusion.

Ryan v. *Stevedoring Co.* v. *Norton,* D.C. Pa. 1943, 50 F. Supp. 221.

The Deputy Commissioner is not bound to accept medical testimony.

Southern S.S. Co. v. *Norton,* D.C. Pa. 1941, 41 F. Supp. 108.

The Deputy Commissioner is not bound to accept the opinion or theory of any particular medical examiner.

McCarthy Stevedoring Corp. v. *Norton,* D.C. Pa. 1940, 40 F. Supp. 960.

The Deputy Commissioner need not depend upon medical testimony alone.

Watson v. *Gulf Stevedore Corp.,* C.A. Tex. 1968, 400 F. 2d 649.

If the argument of General Dynamics is to prevail in this case as to the claimed uncontradicted medical evidence operating retrospectively would create chaotic conditions between employers, insurance carriers and the claimants as to when the Statute of Limitations would begin running causing the disease or when the disease first ensued, resulting in delays administratively and depriving the claimant of an expeditious payment of compensation and benefits, which was the intent of Congress when it passed the LHWCA.

In *Travelers Insurance Co.* v. *Cardillo,* 225 F. 2d 137 at page 143, in its analysis and discussion of *Urie* v. *Thompson,* 337 U.S. 163 (1947), stated:

* * * "Every claim based upon occupational disease would be barred if the one year limitation period were declared to begin running when contact is first had with the condition causing the disease or when the disease first ensues. At such a time, a potential claimant would have no occasion to realize that there is anything wrong with him, much less than he had suffered damage industrially caused. The Supreme Court has recognized the absurd effects which would result from the application of such a rule in occupational disease cases and has held, in an analogous situation arising under the limitation provisions of the Federal Employer's Liability Act, 45 U.S.C.A. #51 et seq., that an 'employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves.'" * * *

As stated in the *Urie* case *supra* at page 170, The Supreme Court said:

"It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves. . ."

Associated Indemnity Corp. v. *Industrial Accident Commission*, 124 Cal. App. 378, 381.

"The quoted language, used in a state workmen's compensation case, seems to us applicable in every relevant particular to the construction of the Federal Statute of Limitations with which we are here concerned.

> Accordingly, we agree with the view expressed by the Missouri Supreme Court on the first appeal of this case, that Urie's claim, if otherwise maintainable, is not barred by the Statute of Limitations."

INA contends that the language quoted above in the *Urie* case supports the claim of the insurance carrier that the Electric Boat, as last employer, self-insurer, is solely liable for compensation in the instant case.

An attempt to apportion liability among successive employers and carriers under the LHWCA was rejected by Congress when an attempt was made by an employer representative to contain such a provision as stated, in *Travelers Insurance Co.* v. *Cardillo*, *supra* at page 145, as follows:

> * * * "That the Act should contain a provision limiting the proportion of the total award for which a particular employer could be held liable, to the same ratio as the extent of the damage done during the period worked for that employer bore to the total disability. It was acknowledged that, absent such a provision, a 'last employer' would be liable for the full amount recoverable, even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that 'last employment." Nevertheless, the Congress evidently declined to adopt the suggestion thus proffered; and it would seem a fair inference that the failure to amend was based upon a realization of the difficulties and delays which would inhere in the administration of the Act, were such a provision incorporated into it. Thus we conclude that Congress intended that the employer during the last employment in which claimant was exposed to injurious stimuli, prior to the date upon which the

claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. * * *

SUCCESSIVE EXPOSURE TO OCCUPATIONAL DISEASE

* * * "In the case of occupational disease, liability is most frequently assigned to the carrier who was on the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease. It will be observed that, in broad outline, this is comparable to the 'last injurious exposure' rule discussed in the previous subsection except that it places more stress on the moment of disability. Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date. In the search for an indentifiable instant in time which can perform such necessary functions as to start claim periods running, establish claimant's right to benefits, determine which year's statute applies, and fix the employer and insurer liable for compensation, the date of disability has been found the most satisfactory. Legally, it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances the claimant ought to know he has a compensable claim; and, as to successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of the actual contraction of the disease are usually not susceptible to positive demonstration.

Among the conditions to which this rule has been applied are asbestosis, silicosis, pneumoconiosis, tuberculosis, arthritis, dermatitis, occupational loss of

hearing, and various diseases produced by inhalation of chemicals and fumes.

It goes without saying that, before the last-injurious-exposure rule can be applied, there must have been some exposure of a kind contributing to the condition. So, if a silicosis claimant had been transferred to outside work or to work in a place where dust conditions were not harmful, the carrier on the risk during the later period will not be held liable. But, once the requirement of some contributing exposure has been met, courts applying this rule will not go on to weigh the relative amount of duration of the exposure under various employers and carriers. As a result, in some cases carriers and employers that have been on the risk for relatively brief periods, perhaps only a few weeks, have nevertheless been charged with full liability for a condition that had developed over a number of years.

Since the onset of disability is the key factor in assessing liability under the last-injurious-exposure rule, it does not detract from the operation of this rule to show that the disease existed under a prior employer or carrier, or had become actually apparent, or had received medical treatment, or, indeed, as held in North Carolina, had already been the subject of a claim filed against the prior employer, so long as it had not resulted in disability." * * *

Larson's Workmen's Compensation Volume 4, Section 95.21, Pages 17-79 to 17-88, and cases cited as follows:

Federal: *Travelers Ins. Co.* v. *Cardillo,* 225 F. 2d 137 (2d Cir. 1955).

Underwriters at Lloyds v. *Alaska Indus. Bd.,* 160 F. Supp. 248 (D. Alaska 1958). Last insurer was

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Taratino v. *Em Cos Fashions,* 9 A.D. 2d 810, 192 N.Y.S. 2d 881 (1959).

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Edwards v. *Catspano & Grow Constr. Co.,* 15 A.D. 2d 843, 224 N.Y.S. 2d 565 (1962).

North Carolina: *Willingham* v. *Bryan Rock & Sand Co.,* 240 N.C. 281, 82 S.E. 2d 68 (1954).

Oklahoma: *Friendly Chevrolet Co.* v. *Pointer,* 435 P. 2d 579 (Okla. 1967).

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Tennessee: *Wilson* v. *Van Buren County*, 198 Tenn. 179, 278 S.W. 2d 685 (1955).

Tennessee Tufting Co. v. *Potter*, 206 Tenn. 620, 337 S.W. 2d 601 (1960).

The petitioner claims that INA did not submit proof as to injurious exposure from April 1st, 1973 to June 29th, 1973 and dates following. The substantial evidence on the record as a whole supports the finding of the Administrative Law Judge of exposure to asbestos dust and fibers during the whole period of the decedent's employment with General Dynamics as a pipelagger to June 29th, 1973 and following dates.

General Dynamics saw fit to become self-insurer under Section 932 of the LHWCA, as amended, and as self-insured employer occupies the role of a successive insurance carrier that Cardillo indicated should be treated in the same manner as a successive employer. Under Cardillo, General Dynamics, as self-insured employer, should clearly be held responsible.

CONCLUSION

The Respondent, Insurance Company of North America, respectfully asks this court to sustain the finding of the Administrative Law Judge and the Benefits Review Board in finding and ruling that the liability rests with General Dynamics for payment of compensation and other benefits as found and ordered by the Administrative Law Judge and the Benefits Review Board.

Respectfully submitted,

FRANK W. DALEY
Attorney for Respondent,
Insurance Company of North America

Dated: August 2, 1977
New Haven, Conn.

Docket No. 77-4083

CERTIFICATE OF SERVICE OF BRIEF

WE HEREBY CERTIFY that two (2)copies of the within brief were this date mailed to the following

1) Matthew Shafner, Esq.
O'Brien, Shafner, Garvy, Bartnik & Stuart
Attorneys for Respondent, Helen Sobolewski
Bridge Street- At Route One
Drawer 929
Groton, Conn. 06340
(203) 445-2463

2) Kirlin, Campbell & Keating
Attorneys for Petitioner, General Dynamics
Corporation, Electric Boat Division
120 Broadway
New York, New York 10005

3) Miss Laurie M. Streeter
Associate Solicitor
Attention: Mary Sheenan, Esq.
U.S. Department of Labor/OWCP
Attorney for Respondent, Director, office
of Workers' Compensation Programs
Suite N-2716
200 Constitution Ave. N.W.
Washington, D.C. 20210
(202) 523-7580

4) Benefits Review Board of United States
Department of Labor
Office of Workers' Compensation Programs
Operations Division
New Labor Building Room S-2002
Washington, D.C. 20210

Dated: New York, New York
August 5, 1977

By: Hamilton G. Degazon
Hamelton Degazon

Goldner Press, Inc.
Printers for Frank W. Daley Esq.
Attorney for Respondent, Insurance
Company of North America

Sworn to before me
this 5th day of August, 1977

Sylvia Morris
NOTORAY PUBLIC

SYLVIA MORRIS
Notary Public, State of New York
No. 31-4526651
Qualified in New York County
Commission Expires March 30, 1978